United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

77-1034

To be argued by
RICHARD APPLEBY

B P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1034

UNITED STATES OF AMERICA,
Appellee,

—against—

DOMINICK LINARELLO and
PASQUALE PICCIRILLO,
Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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Preliminary Statement

Dominick Linarello and Pasquale Piccirillo appeal from judgments entered on January 13, 1977, in the United States District Court for the Eastern District of New York (Platt, *J.*), convicting them, following a jury trial, of violations of the Gun Control Act of 1968. Linarello and Piccirillo were both convicted, on Count One of the three count indictment, of illegally engaging in the business of dealing in firearms and ammunition without a license during the period May 13, 1975, through September 2, 1976, in violation of 18 U.S.C. §§ 923 and 2. Piccirillo was also convicted on Count Two of the indictment, which charged that he transferred an unregistered sawed-off shotgun, in violation of 26 U.S.C. §§ 5861(e) and 5871. In addition, Linarello, a federally licensed gun dealer, was convicted on Count Three of the indictment

for failing to make appropriate entries and to properly maintain records pertaining to gun transactions, which he is required to do pursuant to 18 U.S.C. § 923 and the rules and regulations promulgated thereunder, in violation of 18 U.S.C. §§ 922(m) and 924.

Maria Piccirillo, Pasquale Piccirillo's wife, and Carmine Mercogliano, who were both named only in Count One of the indictment, were acquitted. Linarello was acquitted on Count Two of the indictment.

Linarello was sentenced to four years imprisonment on Counts One and Three, to run concurrently, and was fined $5,000.00 on each count, for a total fine of $10,000. Piccirillo was sentenced to three years imprisonment on Counts One and Two, to run concurrently, and a total fine of $2,000. Appellants are free on bail pending appeal.

On appeal, Linarello raises a number of points. First, he contends that certain statements by his co-defendants were improperly admitted in evidence against him under the co-conspirator exception to the hearsay rule; in addition, he argues that certain guns which undercover agents purchased from his co-defendant, Pasquale Piccirillo, should not have been admitted against him, because the Government allegedly failed to link him (Linarello) to the conspiracy by sufficient independent evidence. Second, Linarello asserts that his unlawful sale of a P.38 Luger to an undercover agent should not have been admitted in evidence against him as a similar act. Third, he contends that the trial judge erred in his charge in several respects. And fourth, he claims that the judge should have granted him a mistrial because of certain alleged prejudicial questions propounded by the prosecutor to co-defendant Maria Piccirillo on cross-examination.

Pasquale Piccirillo contends that the judge improperly denied his motion to dismiss the indictment at the close of the case, because first, allegedly by his own testimony, he (Piccirillo) established entrapment as a matter of law and, second, because the informant in the case was paid a contingent fee. Piccirillo further contends that there was insufficient evidence for the jury to find that he was predisposed to commit the crimes of which he was convicted and that the Government thus failed to rebut his entrapment defense. Finally, Piccirillo argues that the judge improperly denied his request to charge the jury that because the informant did not testify the jury could infer that his testimony was adverse to the Government.

Statement of Facts

A. The Government's Case

The Government's case consisted chiefly of the testimony of two undercover agents of the Bureau of Alcohol, Tobacco and Firearms ("ATF"), Michael Zezima and John Pitta. They testified to a long series of negotiations and meetings, usually at Piccirillo's house or Linarello's gun shop on Fulton Street in Brooklyn, during the period between May 13, 1975, and September 2, 1976, during which time the agents purchased from appellants a total of eleven handguns and one sawed-off shotgun. Prior to July 27, 1976, when the agents purchased a sawed-off shotgun directly from Linarello at his gunshop, the usual *modus operandi* was as follows: the agents would meet Piccirillo at his house in Brooklyn; the agents and Piccirillo would drive to the Fulton Gun Shop; the agents would give Piccirillo money; and Piccirillo would then enter the store and emerge with the guns.

The Government's final witness was an agent of ATF, Gunnar Erickson, who, pursuant to a warrant, conducted

a search of Linarello's gun shop on September 2, 1976. An expert in the proper maintenance by gun dealers of books and records and the federal statutes pertaining thereto, Erickson testified to substantial discrepancies in Linarello's books and records.

Agent Zezima testified that he was introduced to Pasquale Piccirillo and his wife, Maria, on May 13, 1975, by an informant, Frank Sogliozzo, at the Piccirillo's home, 140 McKinley Avenue, in the East New York section of Brooklyn (66).[1] The informant told Piccirillo that the agent was interested in purchasing guns. Piccirillo replied that one Patsy Sorrentino had not yet arrived with the firearms. When Sorrentino did arrive shortly thereafter he told Piccirillo that he did not have the guns. To avoid losing a good customer, Piccirillo sold to Zezima, in the presence of his wife, one hand gun and seven bullets for $100. Piccirillo told Zezima that if he had arrived earlier, he would have found Piccirillo with many more guns to sell (73). A meeting was then scheduled for the following Friday, May 16th, to arrange additional firearms purchases (75).

On May 16, 1975, Sogliozzo and Zezima returned to Piccirillo's home. There, Piccirillo introduced Zezima to Carmine Mercogliano (76).[2] Mercogliano stated that he was a trafficker in all types of illegal firearms (78). Mercogliano, Piccirillo, Zezima and Sogliozzo then went to Mercogliano's home (79). There, the four were joined by Sorrentino, who offered a gun for sale. Zezima paid

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[1] All references are to the trial transcript. Numbered references followed by dates are to the proceedings of November 16 and November 17, 1976.

[2] Contrary to Piccirillo's implication in his brief that he and the undercover agents did not communicate well, the record shows that Agent Zezima was born in Italy and speaks fluent Italian, Piccirillo's native tongue (66).

Sorrentino $125 for the gun, and Mercogliano supplied Zezima with bullets (82). Piccirillo said he would have additional guns in the future (83).[3]

During the next few months, Zezima had numerous conversations with Mercogliano concerning future gun purchases (90-98). During these discussions, Mercogliano identified appellant Linarello as his source of supply (97-98).

On April 5, 1976, as a result of previous arrangements, Zezima returned to the Piccirillos' home with fellow agent John Pitta for the purpose of purchasing two hand guns (99). Piccirillo told the agents that he would have to go to his supplier's house to get the firearms. Piccirillo and the agents then drove in the agents' automobile to the vicinity of the Fulton Gun Shop in Brooklyn, a business owned and operated by appellant Linarello (132). Outside the shop the agents gave Piccirillo $270 for the two guns. Piccirillo then entered the shop and obtained the guns. A short time later, upon emerging from the store, Piccirillo turned the guns over to the agents (99-102).

On April 6, 1976, Piccirillo telephoned Pitta and informed him that he had additional guns for sale. After the agents arrived at Piccirillo's residence, Piccirillo told his wife Maria to retrieve the guns from another room. Placing the firearms on the kitchen table, Maria said that the guns were from a gunsmith (200). The agents paid the Piccirillos $300 for the supplier of the guns and $40 for their fee. Before Zezima and Pitta left, Piccirillo asked the agents to telephone him the following week (108-110).

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[3] After May 16th, the informant Sogliozzo was not present at any of the meetings involving the agents and appellants.

On April 28, 1976, Piccirillo telephoned Zezima and told him he had guns for sale the following day. On April 29th, the agents met Piccirillo at his residence. Again, the three drove to the Fulton Gun Shop. There, Pitta gave Piccirillo $100 for a gun and $25 for his fee. Piccirillo entered the Fulton Gun Shop and emerged ten minutes later with the gun and twelve rounds of ammunition, which he turned over to the agents (112-115).

On July 27, 1976, Pitta and Zezima returned to the Piccirillos for additional purchases of guns. Pitta convinced Piccirillo to introduce him to his source of supply but assured Piccirillo that he would still get his usual fee for any subsequent purchases which were made directly from the supplier (202). The agents and Piccirillo then drove to the Fulton Gun Shop. In front of the gun shop, Piccirillo introduced Linarello to Pitta. Piccirillo stated to Pitta, in the presence of Linarello, that Linarello was his source of supply for illegal guns (203). Piccirillo explained to Linarello that Pitta was the man he had been dealing with during this entire period and that he was "good people and could be trusted" (203). Linarello said that he had a P.38 Luger and a sawed-off shotgun for sale. Linarello took Pitta to the back room of his shop and, in the presence of Piccirillo, sold Pitta the guns for $300. Linarello stated that for the right price Pitta could own any gun in the store (115; 205).

On August 3, 1976, at Piccirillo's residence, Pitta and Zezima purchased another gun from Piccirillo and his wife for $225 (120; 220). When Pitta complained that the gun was rusty, he, Agent Zezima and Piccirillo returned to Linarello's gun shop to discuss the matter. There, Linarello inspected the gun and found it to be operable. Linarello stated that "If (Pitta) don't want it he don't have to take it, I have other customers" (220). Pitta kept the gun and told Linarello that he would see him again (125; 220).

On September 2, 1976, the agents went with Piccirillo to the Fulton Gun Shop to purchase additional guns. Piccirillo went into the shop alone and then emerged with Linarello. Linarello and Piccirillo shook hands. Piccirillo then delivered two guns to the agents. The defendants were immediately placed under arrest (130-131).

Gunnar Erickson was the final witness for the Government. Erickson was employed by the New York City Police Department for 21 years as a ballistics expert. Later he became an ATF agent in charge of processing federal firearms licenses. Erickson has testified in hundreds of cases, giving expert testimony on firearms (343). In the course of his duties, he has become completely familiar with the federal rules and regulations pertaining to firearms.

On September 2, 1976, Erickson procured a search warrant authorizing him to seize all books and records of the Fulton Gun Shop and all weapons not recorded in the books and records (355). When Erickson arrived at the gun shop, he asked Linarello for all the books and records required to be maintained pursuant to federal law (356). Linarello produced seven bound books (360; 390). Erickson and his team of agents spent the next eight hours comparing the guns in the shop with those that were recorded in the records. Forty unrecorded firearms, including the bound books, were seized.[4]

B. The Defense Case

All defendants testified. Pasquale Piccirillo gave a bizarre account of the events in question. The thrust of

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[4] It was stipulated that none of the defendants, other than Linarello, had a federal license to deal in firearms and ammunition (344).

his testimony was that he had been both entrapped and coerced by the agents (whom he considered to be Mafioso) and the informant, although he admitted on cross-examination that he was months into the negotiations with the agents before the agents allegedly began their coercive methods (580).

Piccirillo explained that his troubles began when he found, as he was repairing his kitchen, a rusty gun in a hole in the wall (472). Thus, when Zezima and Sogliozzo approached him about guns, he remembered that he had left the gun in the hole in the wall months ago. He gave the agent the gun as a gift—not for money—because he was a fellow countryman from Italy (473).

Subsequent to this meeting, Piccirillo testified, he was threatened and coerced by the informant into selling guns to the agents. Piccirillo said that he was told by Sogliozzo to go to the hallway of an apartment building just adjacent to the Fulton Gun Shop and from there to retrieve guns which he was to deliver to Zezima and Pitta. Sogliozzo would allegedly instruct Piccirillo that the guns would be on the floor in the hallway.[5] Sogliozzo also supposedly instructed Piccirillo to place the money from the sales of the guns in an open mailbox in the hallway. While there were many mailboxes in the hallway, Sogliozzo never informed Piccirillo in which mailbox the money should be deposited (488). Piccirillo went to the hallway on a number of occasions to retrieve the guns. Piccirillo also said that he never contacted the agents to inform them that he had guns available. Instead, on each occasion that Piccirillo retrieved the guns, the agents

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[5] The improbability of this story, a tale which the jury obviously disbelieved, is highlighted by the fact that the door to the hallway is unlocked and opens onto Fulton Street, an extremely busy thoroughfare (48).

would coincidentally be waiting for him at his residence (489a). Not surprisingly, Piccirillo testified that he had no transactions in guns with any of his co-defendants, although he did admit to introducing Linarello to the agents on one occasion.

Dominick Linarello denied selling any guns to either the agents or to Piccirillo (765). Linarello admitted that on one occasion he talked to Agent Pitta about the pizza business (760).

ARGUMENT

POINT I

Appellant Linarello's participation in the conspiracy was established by a fair preponderance of non-hearsay evidence, so that hearsay statements of his co-conspirators were properly admitted in evidence.

Linarello argues that the trial court improperly admitted in evidence, through the testimony of Agents Pitta and Zezima, hearsay statements of co-defendants Pasquale and Maria Piccirillo to the effect that Linarello was their source of supply for guns. Linarello bases this argument on the contention that there was insufficient non-hearsay evidence linking him to the conspiracy or joint venture. Alternatively, Linarello argues that the hearsay statements should not have been admitted because the Government did not prove a conspiracy or joint venture.

It is a well-recognized exception to the hearsay rule that the declarations of one conspirator may be used against another conspirator not present if the declara-

tions were made during the course of, and in furtherance of, the conspiracy. *Lutwack* v. *United States*, 344 U.S. 604, 617, *reh. denied*, 345 U.S. 919 (1953). Such hearsay evidence may only be admitted against a defendant, however, where there is independent, non-hearsay evidence of the existence of the conspiracy and the defendant's participation therein. *Glasser* v. *United States*, 315 U.S. 60, 74 (1942). The Second Circuit has adopted the rule that in order for hearsay evidence to be admitted under the co-conspirator exception, the defendant's participation in the conspiracy must be established by a "fair preponderance" of independent non-hearsay evidence. *United States* v. *Geaney*, 417 F.2d 1116, 1120 (2d Cir. 1969), *cert. denied, sub nom. Lynch* v. *United States*, 397 U.S. 1028 (1970); *United States* v. *Stanchich*, 550 F.2d 1294, 1299 n. 4 (2d Cir. 1977). In this case, we submit that there was more than the required non-hearsay evidence linking Linarello to the conspiracy.[6]

First, it will be recalled that on July 27, 1976, Agent Pitta convinced Piccirillo to introduce him to Piccirillo's source of supply for illegal guns. Piccirillo then took Pitta to the Fulton Gun Shop and there introduced Linarello to Pitta as his supplier. Piccirillo further told Linarello that Pitta was the man to whom he had been supplying the guns during the entire period. Linarello then took Pitta to the back of his store and sold to him, in the presence of Piccirillo, a sawed-off shotgun and Luger. Thus, not only was Linarello present when Piccirillo made incriminating statements about him, *Cf. United States* v. *Geaney*, *supra*, 417 F.2d at 1120, but he (Linarello) directly sold firearms to the undercover agent. Hence, there was unequivocal and direct evidence that Linarello had entered

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[6] Under Rule 801 of the Federal Rules of Evidence, statements of co-conspirators made during the course of, and in furtherance of, the conspiracy are not hearsay.

into an agreement with Piccirillo to distribute illegal guns.

However, there was additional independent evidence of Linarello's participation in the conspiracy so as to permit the admission of the hearsay statements. On a number of occasions, Piccirillo was observed by the agents entering Linarello's gun shop without any guns and emerging several minutes later with guns, which were then delivered to the agents. Moreover, on August 3, 1976, Pitta again met with Linarello at the gun shop, in the presence of Piccirillo, and complained about the operability of a gun he had received earlier from Piccirillo. Linarello stated he would not take the gun back because he found it to be in working order, thus clearly demonstrating that he was the supplier of the gun. Finally, on September 2, 1976, the agents seized thirty guns from Linarello's gun shop which were not recorded in his books and records. It could properly have been inferred that these weapons were not recorded because Linarello intended to sell them illegally, an inference supported by Linarello's comment to Pitta that for the right price Pitta could have any gun in his store. Thus there was clearly considerable non-hearsay evidence linking Linarello to the conspiracy.

Linarello's alternative argument—that the hearsay statements should not have been admitted because the Government did not prove a conspiracy or joint venture—is equally unavailing. The Government's theory of the case was that Linarello, the Piccirillos, and Carmine Mercogliano comprised a joint venture to distribute illegal guns, with Linarello acting as the supplier to the other three defendants. It is settled that if the Government *proves* a conspiracy, without actually charging the defendant under the conspiracy statute, the co-conspirator exception to the hearsay rule nevertheless applies.

United States v. *Richardson*, 477 F.2d 1280 (2d Cir.), *cert. denied*, 414 U.S. 843 (1973). While recognizing the above rule, Linarello nevertheless argues that the Government did not prove that he knew that the Piccirillos were operating the unlawful business of dealing in firearms (Br. p. 5). This assertion is flatly contradicted by the circumstances of the July 27th and August 3rd meetings between the agents and Linarello just discussed above.

Similarly, Linarello's claim that there was no evidence that he had a stake or interest in whether Piccirillo resold the guns is also contradicted by the facts of the above meetings. Obviously, if Linarello had no interest in whether the guns were resold by Piccirillo, Piccirillo and Pitta would not have returned to Linarello's gun shop with the rusty gun on August 3, 1976. Moreover, the agents testified that the monies paid to Piccirillo for the guns were made in two parts, one part for the gun, and one part for Piccirillo's fee. Clearly, then, the first part of the payment was intended for Linarello.

Moreover, the statements by Piccirillo and Mercogliano that Linarello was their source of supply were clearly in furtherance of the conspiracy. The statements were uttered during the undercover negotiations with the agents in an obvious effort to impress the agents with their easy access to guns and to thereby induce further sales. Indeed, it may be asked: what reason *would* there be for the defendants to make such statements if it was not to induce further transactions?

Finally, the court was careful to instruct the jury, both in its charge and at a number of points during the trial, that the hearsay statements of Linarello's co-defendants were admissible against Linarello only if the jury was convinced beyond a reasonable doubt that Linarello was an "active participant" with his co-defendants in the

illegal venture (195-196, Tr. of Nov. 17). See also 69; 128. Similarly, the trial judge instructed the jury that the guns which Piccirillo took from the gun shop, but which were not directly observed by the agents in the possession of Linarello, could be considered against Linarello only if the jury was convinced beyond a reasonable doubt that at the time the guns were acquired Linarello was part of the illegal venture (114-115; 197 Tr. of Nov. 17).[7]

POINT II

The P.38 Luger was properly admitted in evidence.

On July 27, 1976, appellant Linarello sold to Agent Pitta, at the Fulton Gun Shop, the sawed-off shotgun which formed the basis for the charges in Count Two of the indictment. In the same transaction at the gun shop, Linarello sold to Pitta a P.38 Luger. Linarello argues that the trial judge improperly admitted evidence of the P.38 sale as a similar act and that the Government, improperly, failed to give notice of its intention to offer

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[7] In effect, the jury was told that it could only consider the statements of Piccirillo and Mercogliano and the firearms delivered by Piccirillo if it found Linarello guilty of participating in a conspiracy. Linarello was thus given the benefit of instructions to which he was not entitled. See, *United States* v. *Ragland*, 375 F.2d 471, 479 (2d Cir. 1967), *cert. denied*, 390 U.S. 925 (1968).

With respect to Linarello's claim that the guns which Piccirillo sold to the agents should not have been admitted against him (Linarello), we further note that the citation to the *Geaney* line of cases is totally inapposite. The admissibility of those guns had nothing to do with the hearsay rule. The only proper question is whether the trial judge abused his discretion in concluding that evidence of the firearm sales by Piccirillo was relevant in proving that Piccirillo and Linarello were in the business of unlawfully dealing in guns. Clearly he did not.

evidence of the sale. We submit that the judge was correct in admitting the gun for several reasons.

First, since the delivery of the P.38 Luger was made at the same time as the delivery of the sawed-off shotgun, it was part of the same *res gestae* by Linarello and was admissible as such. Second, Linarello did not record the transaction involving the P.38 in his books and records at the gun shop, as he was required to do.[8] Thus, the unrecorded sale was direct evidence of Linarello's guilt on Count Three. Third, the sale was further corroboration of Linarello's guilt on Count One; that is, that he was the illicit supplier of the guns to Piccirillo. Finally, the gun was admissible as a similar act to show Linarello's intent to further the illegal venture. Rule 404(b), Federal Rules of Evidence, *United States* v. *Papadakis*, 510 F.2d 286, 294 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975). Indeed, the court admitted the P.38 on the basis that it was a similar act to prove intent on Count One and on the basis that it was direct proof on Count Three. Moreover, the jury was carefully instructed, both during the trial and in the charge, on the nature of this evidence (211-214; 197-200, Tr. of Nov. 17).

Finally, and most significantly, prior to his charge to the jury, Judge Platt read to Linarello's attorney (Jacob Lefkowitz) that portion of his charge which concerned the limited basis upon which the court was admitting evidence of the sale of the P.38 (161-164, Tr. of Nov. 16). Counsel specifically stated that he had no objection to the instructions (164, Tr. of Nov. 16).

As noted above, Linarello also asserts that he should have been given advance notice that the Government

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[8] Agent Erickson also testified that not a single gun transaction involving the Piccirillos or Mercogliano was recorded in Linarello's books and records (384-385).

intended to introduce this gun as a similar act. As indicated above, the gun was admissible not only as a similar act but as direct proof of Linarello's guilt on Count Three. In any event, Linarello has not cited any authority, nor are we aware of any, that requires the Government to give notice in advance of trial of its intention to offer similar act evidence. Finally, the 3500 material, which was handed over prior to the picking of the jury, gave notice to Linarello of the Government's intention to offer this gun (3-4). The admission of the Luger was entirely proper.

POINT III

The court correctly charged the jury with respect to the allegations in Count Three and the definition of a firearm.

Linarello contends that the court's charge to the jury was improper in several respects. First, he claims that, with respect to unrecorded guns admitted in evidence on Count Three, the trial judge should have instructed the jury that, pursuant to regulations promulgated under 18 U.S.C. § 923, he had until the close of business following the day of receipt of the guns to record such transactions in his books and records. See 27 C.F.R. § 178.125(e) ("Record of receipt and disposition"). Secondly, Linarello argues that the court did not adequately define a "firearm frame or receiver", 27 C.F.R. § 178.11, in its charge to the jury. We disagree.

First, although the judge did not so charge, the jury was well aware of the regulation that a gun dealer has until the close of the following business day to enter gun transactions in his books and records. Agent Erickson so testified (353; 418-419). In addition, counsel for Linarello spent some time on cross-examination attempting to prove that some of the guns could have been received

at the gun shop on the date of the seizure, September 2nd, and, thus, were not in violation of this regulation (413-422). The jury obviously concluded that Linarello did not receive all thirty unregistered guns on the preceding day. In any event, Linarello never requested the judge to read this regulation to the jury in the charge, which fully covered the elements of the offense (189-192, Tr. Nov. 17), and he is now estopped from raising this claim on appeal. *United States* v. *Indiviglio*, 352 F.2d 276 (2d Cir. 1965), *cert. denied*, 883 U.S. 907 (1966); *United States* v. *Rosenthal*, *supra*, 470 F.2d 837, 843-844.[9]

Furthermore, it can hardly be argued that the jury was not adequately instructed on the definition of a firearm. Linarello disputed Erickson's testimony that certain frames or receivers, which were received in evidence, were actually "firearms" under the Gun Control Act. Judge Platt read the definition of "firearm frame or re-

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[9] Similarly without merit is Linarello's alternative claim that the Government failed to prove that he did not record all gun transactions because it did not produce all books and records from the gun shop at trial. The claim is disingenuous in the extreme. In the first place, there is nothing in the record to indicate that the Government did not in fact produce all the books and records. At the time of the seizure on September 2, 1976, Agent Erickson asked Linarello for *all* his books and records. Linarello produced seven (360). It was after almost two months that Linarello produced an additional book, which, admittedly, was not on the premises at the time of the search. Linarello did not testify that there were additional books. After Linarello produced the additional book, the Government permitted him to compare the entries in that book with the seized guns. Eight guns were found to be recorded, and the Government did not offer these guns against Linarello on Count Three.

Linarello's argument that the Government failed to prove the chain of custody of the books and records seized on September 2, 1976 is also meritless. Agent Erickson positively identified the books at trial as those which he had seized from the gun shop on September 2, 1976 (361). In any event, the chain of custody goes to the weight of the evidence and not to its admissibility.

ceiver" to the jury and let them decide the issue (191). While the court reporter apparently incorrectly heard the word "references" in lieu of the correct word "receiver", the charge was easily comprehensible. In any event, this same regulation was read to the jury correctly during Erickson's testimony (423). Finally, Linarello took no exception to the judge's charge on this score and he cannot now complain. *United States* v. *Indiviglio, supra; United States* v. *Rosenthal, supra.*

POINT IV

The trial judge properly denied Linarello's motion for a mistrial.

Maria Piccirillo, wife of appellant Piccirillo, testified in her own behalf and offered a defense of entrapment and coercion (709-739). In order to show her predisposition to commit the crime of which she was accused (dealing in firearms without a license—Count One), the Government offered to introduce testimony of an undercover police officer that Mrs. Piccirillo had contracted with the officer to have an individual's legs broken. Judge Platt ruled that the Government could cross-examine Mrs. Piccirillo concerning this incident. However, he also ruled that the Government was bound by her answers to these questions, and could not introduce the testimony of the undercover officer (728-738).

While Linarello did object to this line of questioning and moved for a mistrial, he did not request a limiting instruction. More significantly, Mrs. Piccirillo was acquitted by the jury. If Mrs. Piccirillo was not prejudiced by this questioning, Linarello certainly cannot be heard to complain. His claim that his conviction should be reversed because a mistrial was not granted is without merit.

POINT V

Piccirillo did not establish a defense of entrapment as a matter of law.

It will be recalled that Pasquale Piccirillo testified that the informant telephoned him on various occasions and told him that guns, which the informant supplied, could be found in a hallway near the Fulton Gun Shop. Citing *United States* v. *Bueno*, 447 F.2d 903 (5th Cir. 1971), and other Fifth Circuit cases, Piccirillo contends that, since the Government did not produce the informant as a witness, his testimony that the informant was the supplier stands uncontradicted and he was entitled to a judgment of acquittal as a matter of law. The claim is wholly without merit.

Bueno held that where the uncontradicted evidence shows that the government is the defendant's source of supply of contraband, entrapment is established as a matter of law. However, this doctrine has been rejected by the Supreme Court and by this Circuit. *United States* v. *Hampton*, 425 U.S. 484 (1975); *United States* v. *Neal*, 536 F.2d 533 (2d Cir.), *cert. denied*, — U.S. —, 97 S.Ct. 155 (1976). See also *United States* v. *Russell*, 411 U.S. 423 (1973). In *Neal* the issue was "whether the judge should have enlarged on the traditional entrapment defense [inducement and predisposition] by charging the jury that if it found that the government informer had supplied Neal with the contraband shotgun, the jury had to acquit." *United States* v. *Neal*, *supra*, at p. 534. This Court concluded that *Hampton*, *supra*, required a negative answer to this question.

It is clear that a defendant has only made out a defense of entrapment if the evidence shows that he was induced to commit the crime and the prosecution does not meet its resulting burden of showing that the defendant was predisposed to commit the crime. *United States* v.

Swiderski, 539 F.2d 854, 857 (2d Cir. 1976). The evidence at trial was overwhelming that Piccirillo was not entrapped. At the first meeting with Agent Zezima, Piccirillo sold a gun for $100. He told Zezima at this meeting that had Zezima arrived earlier he would have found a large shipment of guns available for sale. And, even prior to this meeting, Piccirillo had made arrangements to have guns brought to his house for Zezima's inspection. In addition, Piccirillo continued to deal in guns and ammunition with the agents for the next 14 months, and, by his own admission, the relationship between him and Zezima was amicable during the early months of the negotiations. Finally, the jury could have taken into account Piccirillo's incredible story concerning the alleged coercion by the informant in concluding he was not entrapped. See *United States* v. *Pui Kan Lam*, 483 F.2d 1202, 1208 (2d Cir. 1973), *cert. denied*, 415 U.S. 984 (1974).[10]

Piccirillo also claims that he was entitled to a judgment of acquittal because the informant was allegedly paid a contingent fee of $200 for the introduction of the Piccirillos to the agents. The contention is frivolous. In the first place, there is absolutely no basis in the record for the claim that Sogliozzo was paid a contingent fee. Agent Pitta's testimony was only that the mones were paid as a reward (300). There is not a single reference in the record to a contingent fee arrangement with the informant. Moreover, the Supreme Court has recognized

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[10] Without going into detail, the Government contends that Piccirillo's Statement of Facts contains unfair characterizations and statements not based on the record. To cite one glaring example, to support several statements in his brief (Br. p. 4-5), Piccirillo cites page 457 of the transcript which contains the testimony of his brother-in-law, Giovanni Russo. The record reflects that Russo testified out of the presence of the jury. When Judge Platt heard his testimony, he ruled that Russo's testimony was inadmissible, and Russo never testified as a witness (460).

that the use of paid informants is a legitimate investigatory technique. *Sherman* v. *United States*, 356 U.S. 369 (1958); *Sorrells* v. *United States*, 287 U.S. 435 (1932). And this Circuit has also found nothing improper in the payment of monies to informants. *United States* v. *Neal*, *supra*, 536 F.2d 533. See also *United States* v. *Swiderski*, *supra*. In addition, *Williamson* v. *United States*, 311 F.2d 441 (5th Cir. 1962), cited by Piccirillo, is a case strictly limited to its facts by this Circuit in *United States* v. *Cuomo*, 479 F.2d 688 (2d Cir.), *cert. denied*, 414 U.S. 1002 (1973). Finally, the alleged contingent fee issue was not raised at any time during the trial. Cf. *United States* v. *Neal*, *supra*, at p. 534.

POINT VI

Piccirillo was not entitled to a charge that because of the failure of the Government to call the informant as a witness, the jury could draw an inference that the informant's testimony would have been adverse to the Government.

Piccirillo contends that he was entitled to a charge that because of the failure of the Government to call the informant as a witness the jury could draw an inference that the informant's testimony would have been adverse to the Government. There is no legal authority to support this claim. Even if the facts showed that the informant was available, the only charge Piccirillo would have been entitled to was that because of the failure to call the informant, the jury could draw an inference against *either* side. *United States* v. *Crisona*, 416 F.2d 107, 118 (2d Cir. 1969). However, the record clearly reveals that Piccirillo was not entitled to this charge because both the defense and the Government made substantial efforts to locate the informant and could not do so.

The facts with respect to the informant, Frank Sogliozzo, are as follows: Prior to the impanelling of the jury, counsel for Piccirillo stated that his defense would be entrapment and that he wished to know the name of the informant. The Government complied with that request and turned over to counsel his last known address (53). The Government also disclosed to counsel for Piccirillo that ten days prior to trial Sogliozzo had received a reward of $200 (300). Agent Pitta testified that since the time of the payment, Sogliozzo had not been in communication with, or under the control of, the Government (299). When Piccirillo's counsel stated that he wished to call the informant as a witness, both the Government and the defense made substantial efforts to locate him (12-17, Tr. of Nov. 16). ATF Agent Arnold Cole testified (out of the presence of the jury) to the steps he took to locate Sogliozzo (12-17, Tr. of Nov. 16). Counsel for Piccirillo also made efforts to locate Sogliozzo and, indeed, told the court that he had been to the informant's house "many times" (16, Tr. of Nov. 16). On the basis of these facts, it is clear that Sogliozzo was unavailable. Accordingly, Piccirillo's request to charge was properly denied.

POINT VII

The trial judge correctly permitted the jury to determine the entrapment issue.

Without basis in the record, Piccirillo contends that, since the Government did not offer any evidence of his predisposition to commit the crime, he was entitled to a judgment of acquittal as a matter of law. The contention is totally without merit.

First, counsel for Piccirillo managed to elicit from Agent Zezima on cross-examination that his client sold guns to other persons in the past (159). Second, as the

Statement of Facts and our argument in Point V clearly demonstrate, Piccirillo was ready, willing and able to deal illegally in guns. Judge Platt correctly charged the jury on the law of entrapment, including predisposition, and properly let the jury decide this question (192-194, Tr. of Nov. 17).

CONCLUSION

The judgments of conviction should be affirmed.

Dated: Brooklyn, New York
May 18, 1977

Respectfully submitted,

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* The United States Attorney's Office wishes to acknowledge the assistance of Margaret Vaughan, a Fordham Law School student, in the preparation of this brief.

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS } ss
EASTERN DISTRICT OF NEW YORK

DOLORES M. BYRD being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 23rd day of May 19 77 he served a copy of the within

BRIEF FOR APPELLEE

by placing the same in a properly postpaid franked envelope addressed to:

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and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, ~~Washington Street~~ 225 Cadman Plaza East, Borough of Brooklyn, County of Kings, City of New York.

Dolores M Byrd

Sworn to before me this

23rd day of May 19 77

Carolyn N. Johnson

CAROLYN N. JOHNSON
NOTARY PUBLIC, State of New York
No. 41-4618298
Qualified in Queens County
Term Expires March 30, 19 79